IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ADOLPH B. SPRECKELS, *Petitioner,* vs. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	No. 9682
COMMISSIONER OF INTERNAL REVENUE, *Petitioner,* vs. ADOLPH B. SPRECKELS, *Respondent.*	No. 9687

RESPONDENT'S PETITION FOR A REHEARING.

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RESPONDENT'S PETITION FOR A REHEARING.

To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

On May 15, 1941, a decision of your Court was entered in the above proceedings for review of decisions of the United States Board of Tax Appeals, affirming the decision in number 9682 and reversing the decision in number 9687. The petitioner in number 9682 and respondent in number 9687, hereinafter referred to as the "taxpayer", feeling that the decision ren-

dered does not give full consideration and effect to the law applicable to the points discussed, respectfully petitions the Court for a rehearing and reconsideration of the Court's decision.

DEDUCTIBILITY OF SELLING COMMISSIONS.

The Court has reversed the holding of the Board of Tax Appeals that *selling* commissions are deductible by one engaged in the business of purchasing and selling stocks, bonds and commodities for profit, announced not only in the present cases but also in its decisions in the *Appeal of Alice du Pont Oritz,* 42 B. T. A. 173, *Appeal of George W. Covington,* 42 B. T. A. 601, *Appeal of Bernon S. Prentice,* decided December 6, 1940, and not officially reported, and *Appeal of Roland L. Taylor, Trustee,* 44 B. T. A. No. 61, decided May 1, 1941. The reversal is placed primarily on the proposition that the Court finds no compelling reason for treating selling commissions differently from purchasing commissions which, on the authority of *Helvering v. Winmill,* 305 U. S. 79, 83 L. Ed. 52, 59 Sup. Ct. 45, are concededly non-deductible, so far as sales of securities are concerned. Petitioner believes there is such compelling reason and that the decisions of the Second Circuit in *Winmill v. Commissioner,* 93 Fed. (2d) 494 and *Neuberger v. Commissioner,* 104 Fed. (2d) 649, distinguishing between purchasing and selling commissions and holding the latter deductible, should be followed.

I. REGULATIONS PROVIDED FOR DIFFERENT TREATMENT OF PURCHASING AND SELLING COMMISSIONS AND AUTHORIZE DEDUCTION OF LATTER.

The provisions of the revenue acts and of the regulations will not be repeated here since it is conceded that during the period involved on these appeals, the regulations provided that commissions on the sales of securities were deductible when they were "an ordinary and necessary business expense". (Reg. 86, Art. 24-2.) The Board found that taxpayer "was engaged in the business of purchasing and selling stocks, bonds and commodities for profit". (R. p. 21.) It would seem *prima facie* that the Board properly reached the conclusion that the selling commissions paid by taxpayer were deductible.

The Commissioner, however, ignoring the fact that sales of "commodities" were also involved and that his authorities dealt only with sales of "securities", urged and this Court has ruled, that such commissions were an ordinary and necessary business expense only in the case of "dealers", that the record did not find taxpayer to be a dealer and hence the deduction was not allowable. This is the fundamental basis for the Court's decision and it is believed that it is untenable for several reasons.

1. Undue weight has been given G. C. M. 15430.

The regulations do not attempt to declare when commissions on sales of securities are an ordinary and necessary business expense and when they are not. Logically, it would seem that where a taxpayer is in the business of buying and selling securities for profit and it is necessary to the ordinary conduct of

that business that he pay selling commissions, he comes within the regulation. Furthermore, if the Commissioner intended otherwise, it was clearly within his power to say so in his regulations and it is difficult, if not impossible, to understand why he should require an opinion of the General Counsel to tell him that his regulations did not mean what they said, but had some hidden limitation.

The Court in its opinion, however, states with reference to G. C. M. 15430, XIV-2 Cum. Bull. 59, the only authority for limiting the deduction to "dealers",

> "We are moved to comment that the interpretation of the regulations by the Assistant General Counsel of the Bureau of Internal Revenue appears intelligent, logical, and reasonable. Moreover, it is but the statement of a long-continued construction of the law and regulation by the administrative officers charged with the enforcement thereof."

That memoranda of the General Counsel and other informal rulings of the Bureau do not have the effect of Treasury Decisions or Regulations, has been repeatedly noted by the Courts. This Court in *Santa Monica Mountain Park Co. v. United States,* 99 Fed. (2d) 450, 457 says:

> "The fact that the General Counsel for the Bureau of Internal Revenue in his memorandum gave his opinion that the decision in the Liberty Bank Case, supra, was correct and that a charge off, 'being a technical requirement, may be made after the taxable year', is not persuasive. Such memoranda and other informal rulings 'have

> none of the force or effect of Treasury Decisions and do not commit the Department to any interpretation of the law.' See *Helvering v. New York Trust Co.,* supra [292 U. S. 455, 468, 78 L. ed. 1361, 1368, 54 S. Ct. 806]; *Cole v. Commissioner,* 9 Cir., 1935, 81 F. 2d 485, 104 A. L. R. 420; *Pictorial Review Co. v. Helvering,* 1934, 63 App. D. C. 21, 68 F. 2d 766."

Also, as suggested by this Court in *Cole v. Commissioner,* cited in the above quotation, the only evidence of a "long-continued construction of the law and regulation by the administrative officers", is this very memorandum itself.

It is submitted that G. C. M. 15430 is entitled to no more weight in the determination of the question before the Court than had its proposition been advanced for the first time in the Commissioner's briefs on these appeals.

2. Record contains no material to which Court can apply G. C. M. 15430.

The submission just made leads logically to the proposition that there is no basis in the record for arguing that taxpayer's method of doing business is such that selling commissions are not a necessary and ordinary expense of that business, or that there is a distinction in that regard as between so-called "dealers" and "traders". The Board found that selling commissions paid by taxpayer were deductible as an ordinary and necessary expense of taxpayer's business of buying and selling securities and commodities. The record of the trial was not preserved or presented to this Court. The Court, however, has

assumed, over taxpayer's protest, that taxpayer was not a dealer and further it is assumed, without any support from the record, that "dealers" have a peculiar problem as to selling commissions because they *may* inventory their securities and therefore have burdensome accounting problems making impossible the charge of selling commissions to particular transactions. A "dealer" is defined as a "merchant of securities" engaged in the purchase of securities and their "resale to customers". (Reg. 86, Art. 22 (c)-5.) Since anyone in the business of buying and selling for profit must of necessity find customers either through brokers or otherwise, evidently the distinction intended is that a "dealer" sells directly to his customers. If that be the case, he should have no difficulty in handling his accounting of "selling commissions" as it is impossible to see where there would be any occasion for paying them. It is submitted the record before the Court is insufficient to warrant an application of the argument in G. C. M. 15430 even if it be valid, and that the Board's decision should be affirmed if it can be sustained on any conceivable set of facts consistent with the findings.

II. WINMILL AND NEUBERGER CASES.

1. Decisions of the Circuit Court of Appeals for the Second Circuit.

The Court has declined to follow the decisions of the Circuit Court of Appeals for the Second Circuit (*Winmill v. Commissioner and Neuberger v. Commissioner, supra*) holding *selling* commissions de-

ductible, remarking the absence of discussion of that point since the decision of the Supreme Court in the *Winmill* case holding *purchasing* commissions not deductible. As the Circuit Court had held deductible both purchasing and selling commissions in the *Winmill* case and the government had seen fit to limit its petition for certiorari to *purchasing* commissions and had, further, on the coming down of the remititur from the Supreme Court, consented to the amendment of the remititur to the Board to allow the deduction of selling commissions (see Appendix), the Circuit Court doubtless regarded the point adequately supported by the distinction found in the regulations and felt that it required no further discussion.

2. Supreme Court's reliance upon Helvering v. Union Pacific Co. does not require holding selling commissions not deductible.

In its decision in the *Winmill* case the Supreme Court quoted with approval from its decision in *Helvering v. Union Pacific Railroad Co.,* 293 U. S. 282, 286, 79 L. ed. 363, 366, 55 S. Ct. 165, a statement to the effect that the consistent treatment by the regulations of commissions paid for marketing bonds not as items of current expense but as deductions from the proceeds of sale, coupled with the re-enactment of the statutory provisions without change, had the effect of establishing that treatment as law, and so held that the regulation required the disallowance of purchasing commissions on securities as an item of expense. In so holding the Court said, in response to the suggestion of inconsistency between that result and the provision in Regulation 77, Article 121, in-

cluding "commissions" among items of business expenses:

> "Special provisions limit the application of those of a broad and general nature relating to the same subject. The special designation of security purchase commissions as a 'part of the cost price of such securities' contained in Article 282 evinces the clear intent to withdraw that special type of commission from the general classification of Article 121." [305 U. S. 83, 83 L. ed. 55, 59 S. Ct. 45.]

Had the Court been considering *selling* commissions, it would have been compelled by its own argument to give effect to the special treatment accorded such commissions by the same article of the regulations and to have held them deductible where they were found to be an ordinary and necessary expense of doing business, as the Board found in this case.

3. **General provision of Article 23 (a)-1, Regulation 86, allowing selling commissions applies, since both securities and commodities involved.**

It has already been noted that Article 24-2, Regulations 86 (similar to Article 282, Regulations 77) and G. C. M. 15,430 apply only to *securities*. It has also been noted that the selling commissions found by the Board to be deductible as business expense included both commissions on sales of *securities* and commissions on the sales of *commodities*. (R. p. 21.) The Board's findings make no segregation as between commissions paid on the respective categories, and the Commissioner has not brought up a record from which such segregation can be made. It is obvious there-

fore that the Board's decision must be sustained if commissions on the sales of either securities or commodities are deductible as a business expense.

As the special, limiting provisions of Article 24-2 apply only to sales of *securities,* the general classification of Article 23 (a)-1 of Regulations 86 (similar to Article 121 of Regulations 77) applies and commissions on the sales of commodities must be allowed as a business expense and the Board affirmed as to that point for the absence of a record showing error.

4. Covington case before Fifth Circuit. Oritz and Prentice cases before Third Circuit.

Three decisions of the Board of Tax Appeals holding selling commissions deductible, decided since the present case, are pending before the Circuit Courts of Appeal in other circuits on the Commissioner's petitions for review. The *Oritz* and *Prentice Appeals, supra,* are pending in the Third Circuit, the *Covington Appeal, supra,* is pending before the Fifth Circuit. The *Covington* case was argued on May 19, 1941, and should be decided shortly. In the interest of uniformity of decision and for the benefit of the reasoning of the Courts in these cases, it is respectfully requested that the present decision be not allowed to become final before these three appeals are disposed of.

CONCLUSION.

In conclusion it is submitted that without the factual background supplied only by G. C. M. 15,430 and without embodying it with an authority it does not possess, there is no warrant in the record for reversing the Board of Tax Appeals determination that selling commissions were an ordinary and necessary expense of taxpayer's business. Further, in view of the specific elimination of such selling commissions from the special rule found in the regulations to the effect that security commissions are not items of expense, the decisions of the Supreme Court in the *Union Pacific* and *Winmill* cases furnish authority for upholding the Board's determination rather than justifying a reversal. Finally, since the restrictions on the deduction of selling commissions apply only to "securities" and not to "commodities", the Board, in the absence of any showing in the record as to the respective amounts of commissions paid on the several classifications, must be upheld in its determination that such commissions are deductible.

A rehearing should be ordered and the Board affirmed in number 9687, and reversed in number 9682 upon the points urged by taxpayer in his briefs in the latter.

Dated, San Francisco,
June 13, 1941.

Respectfully submitted,
WALTER SLACK,
Attorney for Respondent.

CERTIFICATE OF COUNSEL.

The undersigned, attorney for respondent, hereby certifies that he prepared the foregoing petition for a rehearing and that in his judgment it is well founded and that it is not interposed for delay.

Dated, San Francisco,
June 13, 1941.

WALTER SLACK,
Attorney for Respondent.

(Appendix Follows.)

Appendix.

Appendix

COPY OF MOTION FOR MODIFICATION OF MANDATE IN WINMILL v. COMMISSIONER.

(Reproduced from the 1939 Income Tax Service of the Alexander Publishing Co. Inc., Para. 2114.)

Now comes R. C. Winmill, petitioner, in the above entitled proceeding by his attorney, Thomas M. Wilkins, Union Trust Building, Washington, D. C., and moves that the mandate of this honorable court, date of December 9, 1938, affirming the decision of the United States Board of Tax Appeals rendered in this proceeding on May 3, 1937, be recalled and amended so as to modify the former opinion and mandate of this court to affirm the decision of the Board of Tax Appeals in all respects, except with respect to the disallowance of selling commissions and to direct the Board to allow as deduction from income for the year 1932, the said selling commissions in the amount of $9,754.

The Government's petition for certiorari only sought review with respect to the deductibility of purchase commissions and did not seek review with respect to selling commissions.

The decision of the Supreme Court of the United States did not reverse the decision of this honorable court, with respect to selling commissions and hence it is apparent that the mandate of this honorable court should affirm the said Board, in all respects, except with respect to the disallowance of selling commissions in the amount of $9,754.

Wherefore, it is prayed that this honorable court consider this motion and recall and amend its mandate of December 9, 1938, to reverse the decision of the Board of Tax Appeals with respect to the said selling commissions in the amount of $9,754.

No objection

J. W. Morris, Assistant Attorney General
Mandate Amended February 6, 1939

T. M. Wilkins,
Attorney for Petitioner.

So Ordered
Manton.